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6 **UNITED STATES DISTRICT COURT**
7 **DISTRICT OF NEVADA**

8 KINGSTON WONEGIE RANGE,

9 *Petitioner,*

10 vs.

11 JAMES SCHOMIG, *et al.*,

12 *Respondents.*
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14

2:03-cv-01608-RLH-PAL

ORDER

15 This habeas action under 28 U.S.C. § 2254 comes before the Court for disposition on
16 the merits. On June 9, 2000, petitioner Kingston Wonegie Range was convicted following a
17 jury trial of two counts of sexual assault and one count of false imprisonment, with the victim
18 being his spouse or former spouse. The answer seeks dismissal of all claims presented on
19 the face of the petition as bald and conclusory claims, without supplying the Court with the
20 relevant record from the state court trial proceedings. The Court is not persuaded, and
21 respondents accordingly will be directed to file a supplemental answer that both provides a
22 complete response to the claims and supplies the relevant state court record materials.¹

23 ***Ground 1(a): The Victim's Alleged Drug Use at the Time of the Offense***

24 In Ground 1(a), petitioner alleges that he was denied effective assistance of counsel
25 when his trial counsel failed to effectively cross-examine the victim regarding her drug use at
26 the time of the offense and to present a contemporaneous medical report regarding same.

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28 ¹The Court notes that the deputy attorney general presently assigned to the case is not the attorney who filed the answer.

1 In the answer, the respondents first urge that petitioner “merely provides a bare and
2 conclusory statement that the outcome of his sentencing proceeding would have been
3 different had his attorney acted as Moraga desired.” #15, at 7.

4 Respondents’ counsel apparently had the present case confused with another case
5 by a petitioner with a different name. Ground 1(a) clearly concerns a claim regarding
6 counsel’s trial performance, not an alleged deficiency of counsel at sentencing.

7 Ground 1(a) alleges, in full, that petitioner was denied, *inter alia*, effective assistance
8 of counsel, based on the following factual allegations:

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10 Petitioner argues that trial counsel did not adequately
11 investigate and/or cross-examine Mrs. Range on the fact she
12 tested positive for opiates (heroin). Trial counsel failed to present
13 a crucial report made by U.M.C.’s nurse Marian Adams. Mrs.
14 Range was trying to justify the reason she tested positive for
15 opiates. Mrs. Range falsely stated that she took medication
similar to opiates for tonsilitis. Petitioner contends that if trial
counsel would have presented this documents [sic] to the jury, the
jurors would have considered the case in petitioner’s behalf, if the
jury would have known of Mrs. Range’s opiate drug usage.
Therefore, trial counsel was ineffective for not presenting this
crucial document to the jury.

16 #1, at 3.²

17 The foregoing *pro se* claim is not a bald and conclusory claim, either as to the
18 performance or prejudice prongs of the *Strickland*³ standard.

19 In *Haines v. Kerner*, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 592 (1972), the Supreme
20 Court held that the allegations of a *pro se* pleading are held to less stringent standards than
21 formal pleadings drafted by lawyers. 404 U.S. at 520, 92 S.Ct. at 596. Both Supreme Court
22 and Ninth Circuit law firmly establish that this less stringent standard for *pro se* pleadings
23 under *Haines v. Kerner* applies fully to habeas petitions filed by petitioners proceeding *pro se*.
24 See, e.g., *Maleng v. Cook*, 490 U.S. 488, 493, 109 S.Ct. 1923, 1926-27, 104 L.Ed.2d 540

26 ²In the motion to dismiss, the respondents divided the above claim into a Ground1(a) and 1(b). In the
27 answer, it appears that the respondents instead have returned to and followed the petitioner’s original
breakdown of the claims in the petition.

28 ³*Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

1 (1989); *Brown v. Roe*, 279 F.3d 742, 745-46 (9th Cir. 2002); *Zichko v. Idaho*, 247 F.3d 1015,
2 1020-21 (9th Cir. 2001); *Terrovona v. Kincheloe*, 852 F.2d 424, 429 (9th Cir. 1988).

3 Respondents reliance upon *James v. Borg*, 24 F.3d 20 (9th Cir. 1994), is misplaced.
4 In *James*, the Ninth Circuit affirmed the rejection of an ineffective assistance claim based on
5 the allegation that trial counsel should have presented evidence that the petitioner was not
6 the shooter. The Ninth Circuit affirmed because the petitioner did not identify what evidence
7 counsel should have presented that would have shown that he did not shoot the victims,
8 stating that “[c]onclusory allegations which are not supported by a statement of specific facts
9 do not warrant habeas relief.” 24 F.3d at 26. In the present case, in contrast, Ground 1(a)
10 specifically identifies the evidence that petitioner maintains that counsel should have
11 developed; and the petition alleges that the outcome of the trial would have been changed
12 if counsel had done so. That is a sufficiently specific claim that may not be dismissed out of
13 hand on the face of the pleadings without resort to the state court record.

14 Respondents further contend, second, that Ground 1(a) should be rejected because
15 the Supreme Court of Nevada stated as follows on the claim:

16 The record reveals that trial counsel sought to question the
17 victim about a positive drug test, but the trial judge would not
18 allow this line of questioning. Appellant failed to allege what
19 further steps counsel should have taken in this regard.
20 Additionally, appellant does not state how questioning the victim
about the drug test would have aided his defense such that the
outcome of the trial would have been altered. Therefore,
appellant failed to demonstrate that his counsel was ineffective on
this issue.

21 #7, Ex. P, at 3. Respondents maintain that the foregoing constitutes a factual finding that is
22 entitled to a presumption of correctness under 28 U.S.C. § 2254(e)(1) unless the petitioner
23 can show by clear and convincing evidence that the finding is wrong. Respondents urge that
24 petitioner has not so pled and that he cannot now amend his petition to do so.

25 The Court cannot review the correctness of any factual finding without reviewing the
26 underlying record reviewed in making any such factual finding. The AEDPA standard of
27 review is a standard of review not a pleading standard, particularly in a *pro se* case.
28 Respondents must answer Ground 1(a) with argument addressed to the facts in the state

1 court record, with supporting record citations, and must file the relevant state court record.
2 The Court will not dismiss Ground 1(a) on its face as bald and conclusory.

3 ***Grounds 1(b), 2(a) and 2(b): Alleged Prior Statements by the Victim***

4 In Ground 1(b), petitioner alleges that he was denied effective assistance of counsel
5 when his trial counsel failed to introduce into evidence an investigator's report allegedly
6 containing statements by the victim and failed to cross-examine the victim regarding the
7 statements. In Ground 2(a), he alleges that he was denied effective assistance of counsel
8 when his trial counsel failed to adequately cross-examine the victim as to her allegedly
9 conflicting statements. In Ground 2(b), he alleges that he was denied effective assistance of
10 counsel when his trial counsel failed to impeach the victim with, and cross-examine her about,
11 a prior taped verbal statement that she did not want petitioner to go to prison. Grounds 2(a)
12 and 2(b), in particular, include specifics regarding the alleged statements involved. Petitioner
13 included additional factual detail on all three of these claims in his statement of the
14 corresponding claims in the state courts.⁴ The *pro se* claims, construed liberally as they must
15 be under *Haines v. Kerner*, are not so lacking in specificity that they may be dismissed out
16 of hand on the face of the pleadings without resort to the state court record. Respondents
17 must answer Grounds 1(b), 2(a) and 2(b) with argument addressed to the facts in the state
18 court record, with supporting record citations, and must file the relevant state court record.

19 IT THEREFORE IS ORDERED that, within thirty (30) days of entry of this order,
20 respondents shall file a supplemental answer responding to the claims in the petition with
21 argument addressed to the facts in the state court record, with supporting record citations.
22 Respondents further shall file all available state court trial transcripts and any other state court
23 record materials not previously filed that are relevant to the disposition of these claims.

24 IT FURTHER IS ORDERED that petitioner may file a reply to the supplemental answer
25 within thirty (30) days of service of the supplemental answer.

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28 ⁴#11, Exhibit "T-A1" (reply filed in the state district court on October 30, 2002); #7, Exhibits "H" & "I".

1 The Court further informs the parties that, particularly given the age of the case, the
2 Court intends to resolve this matter as expeditiously as possible. Extensions of time will be
3 granted only in extraordinary circumstances, and the parties should treat the deadlines
4 entered in this case as a priority matter over later-filed cases.

5 DATED this 12th day of March, 2007.

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9 ROGER L. HUNT
Chief United States District Judge